Office-Supreme Court, U.S.
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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1963

No. 712

SIDNEY O. SAMPSON,

Plaintiff-Appellant,

—v.—

CHARLES A. CHURCH, District Director, Internal Revenue Service, HON. DAVID L. LADD, Commr. of Patents and HON. WILBUR D. MILLS, Chairman Ways & Means Committee,

Defendants-Appellees.

SIDNEY O. SAMPSON,

Plaintiff-Appellant,

—v.—

CHARLES A. CHURCH, District Director Internal Revenue Service,

Defendant-Appellee.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SIDNEY O. SAMPSON
P. O. Box 3261
Grand Central Station
New York, N. Y. 10017

Petitioner, Pro Se

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CHARLES A. CHURCH, District Director, Internal Revenue Service, HON. DAVID I. LADD, Comm'r. of Patents and HON. WILBUR D. MILLS, Chairman Ways and Means Committee,

Defendants-Appellees.

SIDNEY O. SAMPSON,

Plaintiff-Appellant,

—v.—

CHARLES A. CHURCH, District Director Internal Revenue Service,

Defendant-Appellee.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case as set forth in "Jurisdiction," *infra.*

Citation to Opinion Below

The Order of the District Court for the Southern District of New York is set forth in the Appendix hereto *infra*, p. 23a. The denial of review of the judgment of the District Court by the Court of Appeals for the Second Circuit appears in the Appendix, *infra*, p. 16a.

Jurisdiction

The Order of the District Court for the Southern District of New York was entered on October 9, 1963; Appendix p. 23a *infra*.

Application to the United States Court of Appeals for the Second Circuit to reverse the judgment of the District Court for the Southern District of New York was entered on November 7, 1963, *infra*, p. 3a. Denial of the application was entered November 21, 1963, *infra*, p. 17a.

Motion to the United States Court of Appeals for the Second Circuit to stay issuance of mandate and file application for certiorari to the Supreme Court was granted December 12, 1963, *infra*, p. 31a.

The jurisdiction of this Court is invoked pursuant to United States Code, Title 28, Section 1346 (1), (2), and Rule 19 of this Court.

Questions Presented

1. Whether the subject matter of "tips" is stated in any Section of the Internal Revenue Service Code of 1954.

2. Whether the clause, *Compensation for services*, included in "item 1" of Section 61 of the *Internal Revenue Service Code of 1954* makes a claim for the subject matter of "tips."

3. Whether the reservation clause, *including (but not limited to)*, included in the specification of the "General Definition" of the claims of Section 61 of the *Internal Revenue Service Code of 1954* legally broadens the scope of any of the fifteen (15) listed "items" to *read on* the subject matter of "tips."

Constitutional and Statutory Provisions Involved

1. This case involves ARTICLE XVI OF THE AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

2. This case also involves *The Internal Revenue Service Code of 1954.*

3. This case also involves United States Code, Title 28, Section 1346 (1), (2).

4. This case also involves United States Code, Title 26, Sections 7421, 7422.

5. This case also involves United States Code, Title 35.

Statement

Appellant, SIDNEY O. SAMPSON, respectfully presents this petition for review on the merits of the case under Rule 19 of the Rules of the Supreme Court of the United States, particularly subdivision (b) clause: *an important question of federal law which has not been, but should be, settled by this court;* and under Title 28 of the United States Code, Section 1346 (1), (2).

Appellant pleads that the tax deficiency assessments of the Internal Revenue Service for the years 1959-1960 served on appellant by the above named appellee, CHARLES A. CHURCH, District Director, INTERNAL REVENUE SERVICE, having the non-statutory subject matter of "tips" claimed

therein for collection of additional amounts of "tips" gross income tax assessed therein over the sworn amount of gross income tax that appellant signed for as true, *under the penalty of perjury*, is incontestably defective, because there is no statutory section of law in the *Internal Revenue Service Code of 1954* defining in any way the subject matter of "tips" which the I. R. S. can rely upon to make a legal claim in said deficiency assessments for said subject matter of "tips."

Therefore, appellant claims that the subject matter of "tips" omitted in said Code of 1954, is dedicated to the public as a non-taxable "item" until the time that Congress enacts an honest "tips-tax" law.

How the Federal Questions Were Raised and Decided Below

Appellant is a waiter who for many years prior to the said 1959-1960 "tips" deficiency assessments served on him by the I. R. S., has with clean conscience consistently contributed a substantial percentage of his "tips" added to the wages paid to him as *compensation for services* by his employer, when making out his yearly gross income tax statements; he has always deeply deplored the present injustice of not receiving any concomitant equity accordingly with the retirement benefits contained in the Social Security Act for the "tips" declarations which he voluntarily made in said statements; but said voluntary "tips" declarations have not completely satisfied the I. R. S. The I. R. S. in January 1961 then commenced prosecuting appellant for alleged delinquent "tips" income claimed in said deficiency assessments. This prosecution by the I. R. S. is now in the U. S. Tax Court with appellant appealing via *petition* to the Tax Court, re Docket No. 1958-63, under the provisions of U. S. C. Title 26, Section 7422.

Appellant on April 1, 1963 commenced an action in the District Court, S. D. N. Y. for an answer to the constitutional question of precisely how the I. R. S. construes any section of said Code of 1954 to apply legal tax collection process for the specific amount of "tips" income claimed against appellant in said deficiency assessments. The question was not completely answered in the Order issued by the District Court (see Appendix, p. 23a).

An appeal from said Order of the District Court was made to the Court of Appeals for the Second Circuit comprising substantially the same matters as contained in this petition. This appeal was denied by the Court of Appeals on November 21, 1963 without any decision being made on the merits of the case (see Appendix, p. 17a). Motion to stay issuance of mandate by the Court of Appeals to file an application for certiorari to the Supreme Court of the United States was granted on December 12, 1963 (see Appendix, p. 31a).

Reasons for Granting the Writ

I.

The Internal Revenue Service cannot make any claim in the *Internal Revenue Service Code of 1954* for its prosecution of the subject matter of "tips" being part of taxable gross income tax.

Appellant besides being a waiter is an inventor of educational electronics apparatus, holding the following five (5) United States patents: 2,985,069 and 2,976,372 and 2,971,716 and 2,952,746 and 2,952,416. He has successfully prosecuted both the broad claims and the required restricted claims contained in the claim sections of said patents. Appellant is presently applying in this petition

his technical knowledge of claim construction know-how, gained from his practice of prosecution of claims under the Rules of Practice of the Patent Office. The issued section claims in said patents have statutory prosecution process value against any infringement thereof under U. S. C., Title 35, the same as the statutory prosecution process value against infringement of the issued section claims which were enacted by Congress in said Code of 1954. Therefore, appellant requests that answer be made explaining under what authority of due process of law is it possible for the I. R. S. to prosecute the subject matter of "tips" when there is no relevant section claim of said Code of 1954 cited against appellant in said deficiency assessments—unless the I. R. S. is immune from due process of law under the Constitution. The Courts seem to be unconstitutionally restricted under U. S. C. 26, 7421. (a).

Referring to appellant's appeal from the particular part of the Order of the District Court, page 3, the second paragraph thereof: "Furthermore, . . . without merit." (see Appendix, p. 25a), appellant now respectfully requests that this Court take notice of the specific new issue raised in said second paragraph, to wit, "compensation for services" introduced as *new subject matter* in this case.

On one hand, the Internal Revenue Service has never cited in said deficiency assessments any section of law in said Code of 1954 upon which it could base any definitive claim for said subject matter of "tips" stated in said deficiency assessments. The only claim made by the I. R. S. and applied in said deficiency assessments is the penalty claim, Section 6653 (a) of said Code of 1954, cited therein only to definitively claim its otherwise legal income tax collection process of authorized taxable gross income.

On the other hand, the District Court has precisely stated in said Order, page 3, the second paragraph thereof, the

express term: "compensation for services" which is identical to the express term contained in "item 1" of Section 61 of said Code of 1954, to wit; *Compensation for services* (see Appendix, p. 15a), of which appellant does not admit any such words can "read on" the subject matter of "tips" in this case and in the divisional *petition* case in the Tax Court.

Appellant questions why he must first be "required" to pay anything to the I. R. S. upon service of said deficiency assessments consisting of irregularly amended form-letters introducing the *new subject matter of "tips"*; said form-letters not including any prosecution section claim of said Code of 1954 to therewith institute proper congressional authority for applying legal and constitutional "tips-tax" collection process for said *new subject matter of "tips"* as claimed in said irregularly amended form letters.

Appellant has never admitted that "tips" are "compensation for services".

The I. R. S. has never admitted that "tips" are "compensation for services".

"Compensation for services" being said Order's own introduction of this new subject matter.

Appellant asserts: Unless there is a reference claim existent in said Code of 1954 upon which the I. R. S. can be upheld by this Court, having inclusion of any showing of the word "tips" and/or "gratuities" in any of the over 8,000 sections of said Code of 1954 whereby is shown that the subject matter of "tips" is sufficiently defined for honest, unequivocal, just and legal "compensation for services", then, any unlawful *regulation* that the I. R. S. is presently applying for its prosecution process of said subject matter of "tips" introduced in said deficiency assessments, is therefore illegal and unconstitutional under said 28 U. S. C.,

Section 1346. This is a particular issue which appellant especially requests this Court to decide on the merits of this petition.

Appellant further respectfully requests this Court to analyze the below presented hypotheses, thus to decide the particular issue of "compensation for services" as newly raised in said Order, if the I. R. S. asserts that said "item 1" *Compensation for services* is its legal broad claim that properly defines said subject matter of "tips"; that this matter be considered by this Court in juxtaposition of the job duties that appellant personally performs as a menial service worker employed in the restaurant establishment of his respected employer:

(a) I serve a customer who after being served, does not leave me on the table any "item 1" *Compensation for services* which he is unquestionably entitled in every respect to rightly receive perfect service without paying any added extra charge for said service.

(b) If I ask said customer for the *unreceived* "compensation for services" defined under said Order, then I will be forthwith fired from my job by my employer who pays me regular wages for said "item 1" *Compensation for services* to provide free service to said customer.

(c) Later, in my respective year income tax statement in this case, I did not report said *unreceived* "compensation for services" because I did not receive any percentage of "tips" in this particular instance as claimed for taxable gross income in said statement.

(d) The I. R. S. instigated the present defensive *petition* prosecution in Tax Court respective to said *unreceived* "compensation for services" being a legal part

of my taxable gross income wage, and the action in the District Court.

(e) I have searched throughout said Code of 1954, finding out that "item 1" of said Section 61 and the more than 8,000 other related underlying, supporting sections of said Code of 1954 that rely on the specification of the "General Definition" claim respective to taxable gross income of this subtitle have no inclusion in any section of said Code of 1954, of any word equivalent to "tips" except other than that of the word "gifts" which is shown in the record of this action priorly claimed by appellant for tax exemption purposes (see Appendix, p. 15a). Therefore, there is no possible definition for "tips" made in said "item 1" *Compensation for services* or in any of said 8,000 statutory sections of said Code of 1954 that the I. R. S. can claim for any "tips-tax" collection process.

(f) That said "item 1" of said Section 61 and all of said other 8,000 statutory sections specifically apply only to contractual employment matters of employees and others that require verification by employers' *receipts* for *fees, commissions, and similar items* in the same way as with "item 1" *Compensation for services;* definitely, I could not get any such legal *receipts* on my job.

(g) No recourse in law for prosecuting said customer and said employer is legally provided for in any part of any of said statutory sections of said Code of 1954 for me to lawfully collect said "item 1" *Compensation for services* not received from said customer.

(h) That said "item 1" *Compensation for services* is not even a complete claim in every respect of the usual

canons of claim construction, as applied by the I. R. S. in this case to claim said subject matter of "tips".

(i) While this discussion is limited to a single incident respective to a particular defect in said deficiency assessments, it will be understood that such a single defective working incident as hereby presented is sufficiently applied in this petition to incontestably prove that said "Item 1" *Compensation for services* is not an equivalent means to the subject matter of "tips" in any way, for the I. R. S. to apply any legal tax collection process of "tips-tax".

II.

The reservation clause, to wit, *including (but not limited to)*, included in the specification of the "General Definition" for gross income tax in Section 61 of the *Internal Revenue Service Code of 1954* is illegal and unconstitutional.

A reading by this Court of the juridical decision of the Commissioner of Patents, an agent of government, *re Commissioner of Patents—Ex parte Baer—40 USPQ* (see Appendix, p. 15a), precisely predicts the consequences of the present course of litigation helping support the I. R. S. claim for the subject matter of "tips" as claimed in said deficiency assessments made on irregularly amended form-letters.

It being understood that, *the Constitution is part of every one of the enactments of Congress*, therefore appellant asserts that the I. R. S. is inordinately provided with irregular means to unconstitutionally, *self-legislate* said "Item 1" *Compensation for services* conjunctively with the illegal reservation clause included in the "General Definition" spec-

ification of said Section 61, to wit, *including (but not limited to)* (see Appendix, p. 15a), thus to unconstitutionally and illegally claim and prosecute against appellant the subject matter of "tips" which is not defined in said Code of 1954.

Therefore, if said Order is not reversed by this Court, then, according to said decision of the Commissioner of Patents, quote: *It would further appear that if claims are to be construed only by the prior art and irrespective of their express terms and limitations, the labor of formulating claims and the burden of examination on the basis of prior art is all for naught and wasted effort. It would be far simpler and more logical to dispense with claim writing entirely and to allow the inventor* (Congress) *to state that the disclosed invention* (Code of 1954) *is to be protected by the prior art discovered by the defendant in litigation.*

Therefore, the I. R. S. has irregularly empowered itself, and is supported by the express terms of said new subject matter of "compensation for services" contained in said Order, as predicted by the Commissioner of Patents would be surely obtained during litigation of the case. Thus, the I. R. S. is irregularly empowered to *self-legislate* the subject matter of "tips" into said Code of 1954, instead of the I. R. S. simply notifying the Executive Department and Congress that enactment of an honest "tips-tax" claim is greatly needed as an extra "item" in said Section 61 for honest "tips-tax" collection process.

The United States can greatly increase its revenue with a great many more billions of dollars yearly if a suitable method of weekly withholding of "tips" income is honestly enacted into said Code of 1954 by Congress; thus providing an honest "tips-tax" law satisfactory to all service workers over the present muddling I. R. S. method of mercilessly *persecuting* a few "caught" service workers for alleged delinquent "tips-tax" assessed for many back years, as shown

in the instant case of appellant. This Court should certainly be concerned with this irregular matter of the I. R. S. assessing many years' back-taxes against a few *spot-checked* prosecuted service workers, particularly when they may never be able to pay-up said back taxes during their lifetime. Therefore appellant is rightly appearing before this highest Court seeking justice on this matter.

Therefore, the present Order of the District Court, which includes the *new subject matter* of said "compensation for services" places appellant in an unforeseen, unfortunate position of practically being prejudged guilty of perjury in the Tax Court, if said Order stands and is cited by the I. R. S. against appellant's defensive *petition* in the Tax Court.

Appellant's *petition* in the Tax Court and every other similar "tips" subject matter cases moving in the Tax Court might be summarily dismissed via said Order providing a citable dominating basic Court of Appeals reference against said *petition* and said cases, if said Order is not reversed by this highest Court.

Thus by said Order implying that said "Item 1" *Compensation for services* is equivalent of said subject matter of "tips", appellant's tax statements for 1959-1960 signed as true statements *under the penalty of perjury* are inordinately placed in jeopardy of irreparable damage in the Tax Court.

Therefore, it will be understood that in the divisional *petition* tax case in the U. S. Tax Court, the Internal Revenue Service and appellant are the only principal parties thereto. The subject matter being prosecuted in said divisional *petition* tax case is the *refund* of appellant's voluntary contribution of "tips" made in appellant's gross income tax state-

ments for the years 1959-1960, and is being separately prosecuted under the provisions of 26 U. S. C., Section 7422.

In this divisional tax case in this Court, the Congress which enacted into law the *Internal Revenue Service Code of 1954* and appellant are the only principal parties thereto —the I. R. S. being only a subjective party.

A principal matter in this divisional tax case being prosecuted in this Court is that the reservation clause in the specification part of said Section 61, is seemingly placed in said specification to illegally broaden the scope of the fifteen (15) restricted "item" claims of said Section 61. This illegal reservation clause is asserted by appellant to be unconstitutionally delegated by the Congress to the Executive Department which administers the I. R. S. prosecution process. It should be deleted by Congress accordingly with the expressions made in the priority reference of the Commissioner of Patents.

The damaging consequences of this illegal and unconstitutional delegation of said reservation clause by Congress to the Executive Department being suffered by appellant, is that the complete unlimited and unrestricted broad scope of ARTICLE XVI OF THE AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, the claim of which reads in part:— *The Congress shall have power to lay and collect taxes on incomes, from whatever source derived.*—is therefore totally applied by the I. R. S. against appellant, discriminatively.

But, Congress did *lay* specific taxes on specific gross income "items" in said Code of 1954. Congress did not *lay* a tax on "'tips". Congress has only claimed fifteen (15) broad "item" claims in said Section 61 including the over 8,000 restricted subsection claims related thereto. No "item" claim for the subject matter of "tips" has yet been enacted by Congress.

Therefore, the subject matter of "tips" is abandoned by Congress and dedicated to the public until the time that Congress enacts an honest "tips-tax" law including necessary provisional statutory sections for legal and constitutional tax collection process by the I. R. S.

Therefore appellant claims that the congressional enactment of said Code of 1954 having inclusion of said reservation clause in said Section 61, construed by the I. R. S. for unlimited and unrestricted prosecution process, damagingly against appellant's divisional *petition* in the Tax Court and in this divisional petition in this Court respective to the subject matter of "tips", is illegal and unconstitutional under the provisions of 28 U. S. C., Section 1346(1), (2).

WHEREFORE, for the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

SIDNEY O. SAMPSON
Plaintiff-Appellant, pro se
Petitioner

Sidney O. Sampson
Post Office Box 3261
Grand Central Station
New York, N. Y. 10017
Petitioner, pro se

December 23, 1963

APPENDIX

Order Consolidating Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Case Number 63 Civ. 911, and 63 Civ. 1145

SIDNEY O. SAMPSON,

Plaintiff-Appellant,

—against—

CHARLES A. CHURCH, District Director
INTERNAL REVENUE SERVICE,

Defendant-Appellee.

IT IS HEREBY STIPULATED AND AGREED by and between Sidney O. Sampson, plaintiff-appellant, and Robert M. Morgenthau attorney for the defendant-appellee Charles A. Church, that the above entitled actions be and the same hereby are consolidated into a single action and that one mandate issue in the above named United States Court of Appeals for the Second Circuit.

Order Consolidating Appeals

Dated: New York, New York
November 12, 1963

SIDNEY O. SAMPSON
Plaintiff-Appellant

ROBERT M. MORGENTHAU
United States Attorney for the Southern District of New York
Attorney for Defendant

THOMAS H. BAER
Assistant United States Attorney, of Counsel

SO ORDERED:

November 12, 1963

A. DANIEL FUSARO
Clerk

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

Filed November 12, 1963
A. DANIEL FUSARO, *Clerk*

Motion to Dispense With Filing an Appendix, Etc.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Case Number 63 Civ. 911, and 63 Civ. 1145

[SAME TITLE]

SIR:

PLEASE TAKE NOTICE that, plaintiff-appellant Sidney O. Sampson will move this Court at a Motion Part thereof, to be held at Room 1705, United States Courthouse, Foley Square, City and State of New York, on the 18th day of November, 1963, at 10:30 a.m., or as soon thereafter as plaintiff-appellant can be heard, for an Order pursuant to Rule 20 of the Court for the following relief:

1. Permission by the Court to proceed on typewritten brief.

2. Permission by the Court to dispense with filing an appendix.

3. Permission by the Court to immediately file with the Court a brief containing the points which appellant relies on respective to Rule 24(3) subdivisions (b), (c), (d), and (e), including a single exhibit of supplemental printed matter, as attached hereto.

Motion to Dispense With Filing an Appendix, Etc.

Dated: New York, N. Y.
Nov. 7, 1963

Respectfully submitted,

SIDNEY O. SAMPSON
Plaintiff-Appellant, pro se

SIDNEY O. SAMPSON
Post Office Box 3261
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New York 17, N. Y.

ROBERT M. MORGENTHAU
United States Attorney for the
Southern District of New York
Attorney for Defendant-Appellee

THOMAS H. BAER
Assistant United States Attorney,
Of Counsel

—4—

EXHIBIT ANNEXED TO MOTION

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Case Number 63 Civ. 911, and 63 Civ. 1145

SIDNEY O. SAMPSON,

Plaintiff-Appellant,

—against—

CHARLES A. CHURCH, District Director
INTERNAL REVENUE SERVICE,

Defendant-Appellee.

SIR:

1. Appellant respectfully requests that this action in this Court be made pursuant to Rule 20 of the Court.

2. Appellant pleads in this action before this Court that the tax deficiency assessments of the Internal Revenue Service for the years 1959-60 as signed by the above-named appellee CHARLES A. CHURCH, District Director, Internal Revenue Service, having the non-statutory subject matter of "tips" prosecuted therein for additional amounts of gross income assessed over the gross income tax statements which appellant signed as true gross income tax statements under the *penalty of perjury*, is incontestably defective, because there is no statutory section of law in the *Internal Revenue Service Code of 1954* for the subject matter of "tips" upon which the I.R.S. can assert any restricted claim to define the basis-in-law for the demanded payment of money from

appellant in said deficiency assessments and apply any lawful constitutional process for tax collection as enacted by Congress in said Code of 1954.

3. There being no legal and constitutional claim made under said Code of 1954 by the Congress for the subject

—5—

matter of "tips" therefore appellant asserts that the subject matter of "tips" is dedicated to the public as a nontaxable item until the time that Congress enacts an honest "tips-tax" law for the I.R.S. to lawfully apply legal and constitutional tax collection enforcement process thereto.

4. Appellant is a waiter who for many years prior to the present 1959-1960 "tips" deficiency assessments served on him by the I.R.S. has consistently contributed a substantial percentage of his "tips" added to the wages paid as compensation for services by his employer when making out his yearly gross income tax statements; he has always deeply deplored the injustice of not receiving any concomitant equity accordingly with the benefits of the Social Security Act for the "tips" declarations voluntarily made in his tax statements; but said "tips" declarations as he has made have not completely satisfied the I.R.S. The I.R.S. then started prosecuting appellant in January 1961. The prosecution by the I.R.S. is now in the U. S. Tax Court, Docket No. 1958-63. Appellant on April 1, 1963 commenced an action in the District Court, S. D. N. Y., for a Court decision on the constitutional question of precisely how the I.R.S. is legally empowered under said Code of 1954 to arbitrarily determine the specific amount of "tips" percentage claimed in said deficiency assessments without in any way stating in any of its collection papers a statutory claim for its prosecution process against appellant.

Exhibit Annexed to Motion

5. Appellant besides being a waiter is an inventor of educational electronics apparatus, holding five (5) United States patents, having successfully prosecuted both the broad claims and the necessarily required correlated restricted claims that are sections of said patents. Appellant is presently applying in this action his fundamental technical knowledge of claim construction gained from the

—6—

prosecution of the claims of said patents and patent applications. The issued section claims in said patents have prosecution process value against any infringement thereof the same as that of the issued statutory section claims in said Code of 1954. Therefore, appellant requests the answer from this Court of how it is possible that the I.R.S. can prosecute any section claim of said Code of 1954 in said deficiency assessments without there being asserted any notice of any existent claim in said Code of 1954 of which appellant may have infringed in said deficiency assessments —unless the I.R.S. is immune from due process of law under the Constitution.

6. In view of the foregoing discussion, and now referring to appellant's appeal from the Order of District Court Judge Frederick van Pelt Bryan, page 3, the second paragraph thereof:—"Furthermore, . . . without merit."—entered in this action on October 10, 1963, and further denied October 31, 1963, appellant now respectfully requests the Court to take particular notice of the specific new issue in said second paragraph, to wit, "compensation for services" introduced as new subject matter, and presently pursued by appellant for this Court to decide on the merits of this action as later discussed.

Exhibit Annexed to Motion

7. The Internal Revenue Service has never cited in any part of the record of this action, any statutory section of law upon which it could base a first restricted legal claim for collection of the present illegal and unconstitutional deficiency assessments containing said subject matter of "tips"; the only claim made by the I.R.S. and applied in said deficiency assessments is a restricted penalty claim. (Section 6653 (a)) of said Code of 1954, made expressly for only the collection process against appellant if proved delinquent respective to said deficiency assessments.

—7—

8. The District Court on the other hand in said Order, has precisely stated in said Order, page 3, the second paragraph thereof, the express words in *Section 61 of the Internal Revenue Service Code of 1954, Item 1*, to wit, *Compensation for services*, of which appellant does not admit to be the statutory basis-in-law for applying any restricted legal claim for any prosecution process of collection of said illegal and unconstitutional deficiency assessments in this action, or to apply as a citable broad reference claim against appellant's divisional *petition* case undergoing simultaneous prosecution with said U. S. Tax Court case.

9. Appellant requests this Court to determine why he must first have to pay anything to the I.R.S. serving a collection paper not including a first restricted legal claim establishing a legal and constitutional collection process. There being not existent in any deficiency assessments of such reference any broad or restricted claim upon which this Court could possibly adjudicate "tips" being taxable gross income for any legal and constitutional statutory tax collection process issue.

Exhibit Annexed to Motion

10. Appellant has never admitted in any case in this action that "tips" are "compensation for services".

11. The I.R.S. has never admitted in any case in this action that "tips" are "compensation for services".

12. "Compensation for services" being said Order's own introduction of new subject matter which may cause irreparable damage to plaintiff's divisional defensive *petition* moving simultaneously with said Tax Court case, as prosecuted by appellant for *refund* of appellant's voluntary "tips" contributions.

13. Appellant asserts that unless there is a reference claim existent which can rely on any statutory section of

said code of 1954, whereby appellant is guaranteed that the subject matter of "tips" is precisely defined therein for honest, unequivocal, just and legal "compensation for services", then any present regulation that the I.R.S. is applying for its prosecution of said subject matter of "tips" as applied in said deficiency assessments against plaintiff is therefore illegal and unconstitutional. This is an issue which appellant requests this Court to decide.

14. Appellant respectfully requests this Court to analyze the following hypotheses, thus to decide the particular new issue raised in said Order of whether it is legal and constitutional under the "item 1" of said Section 61, if the I.R.S. asserts that "compensation for services" as prosecuted in said deficiency assessments against plaintiff *under the penalty of perjury* provides a legal definition for said subject matter of "tips", and then to lawfully continue its present

prosecution process—considering how appellant now describes by personal performance his duties as a service worker in the restaurant wherein he works:

(a) I serve a customer who after being served, does not leave me on the table any *compensation for services* of which he is unquestionably entitled in every respect to rightly receive perfect service without any added extra charge for the service.

(b) If I ask said customer for the unreceived "compensation for services" which may be due me, then I will be fired from my job by my employer who pays me regular wages as "item 1" *compensation for services* unquestionably rendered to said customer.

(c) In my respective year tax statement I did not report said unreceived "compensation for services" be-

cause I did not receive any amount of "tips" in this particular instance.

(d) The I.R.S. is now prosecuting me for not having included said unreceived "compensation for services" as part of my gross income wage accordingly including the subject matter of "tips" in said deficiency assessments.

(e) I have searched the Code of 1954, finding that "item 1" of said Section 61 and the more than 8,000 other underlying statutory sections of said Code of 1954 that rely on the "General Definition" of this subtitle have no inclusion of any equivalent word matching that of "tips" except other than that of the statutorily tax exempt word "gifts" which is shown in

the record of this action priorly claimed by appellant as equivalent to "tips". Therefore, there is no possible definition for "tips" made in any of said statutory sections of said Code of 1954.

(f) That said "item 1" of Section 61 and all of said other statutory sections apply only to contractual matters requiring verification by employers' *receipts* of said "item 1" *compensation for services* which, of course, I could not get any legal "receipts" without further lawsuits against said customer and said employer.

(g) No recourse in law for prosecuting said customer and said employer is legally provided for in any part of any of said statutory sections of said Code of 1954 to lawfully collect said "compensation for services"

not received from said customer, or is there any provision in law set forth in any of said statutory sections of said Code of 1954 to balance any possible I.R.S. claim that said "item 1" *compensation for services* is a complete claim in every respect.

(h) While this discussion is limited to a single incident in said deficiency assessments it will be understood that such a single working incident as hereby presented by appellant is sufficiently applied in this action to effectively prove that said "item 1" *compensation for services* is not an equivalent means of "tips" in any way.

15. It is now apparent in view of the above discussion of said new subject matter issue of "compensation for services" raised in said Order, that a reading of the decision

of the Commissioner of Patents, an Agent of government, *re Baer—40 USP,* shown in the record of this action, precisely predicts the present illegal and unconstitutional course that said Order must obviously be supporting the I.R.S. position by distortionately construing said "item 1" *compensation for services* to read on "tips" for an equivalent subject matter broad claim against appellant thus for the I.R.S. to apply as a future citable reference against any said subject matter of "tips" in this action and other similar cases to prosecute said deficiency assessments against appellant.

16. The I.R.S. is obviously relying on the illegal reservation clause part of SEC. 61, GROSS INCOME DEFINED, to wit, *included (but not limited to)* which the Commissioner of Patents has prjorly decided is illegal, to illegally and unconstitutionally broaden the claim of said "item 1" *com-*

pensation for services thus to empower itself, supported by the express terms of said Order against appellant as surely obtained during litigation of the case in the District Court, without there being shown any statutory section of law in said Code of 1954 having any reference claim pertaining to any sufficient coverage sufficiently applied for said subject matter of "tips" in this action. This specific matter at issue in this Court is the crux of this action. Accordingly, appellant requests this issue to be decided by this Court.

17. Therefore, under the present Order of the District Court, which includes the new subject matter of said "item 1" of *compensation for services* as correlated with the subject matter of "tips" in said deficiency assessments at issue

in this action, that the consequence of the particular new issue of said new subject matter raised by said Order places appellant in an unforeseen unfortunate position. Appellant is placed in jeopardy of practically being prejudged guilty of perjury under the moving prosecution of said Tax Court case.

18. Appellant's *petition* moving with said Tax Court case may also be voided by inference of said Order providing a citable reference that the I.R.S. can apply in said Tax Court case against appellant.

19. Thus by said Order implying that said "item 1" *compensation for services* is equivalent of said subject matter of "tips", appellant's tax statements for 1959-1960 signed as true statements *under the penalty of perjury* are placed in jeopardy of irreparable damage both in the Tax Court case and in the instant action.

SUMMARY

The District Court's Order as it now stands may cause unforeseen irreparable damages to appellant's divisional *petition* moving in the U. S. Tax Court. Therefore, appellant prays that this United States Court of Appeals for the Second Circuit will reverse the Order of the District Court against appellant and thus grant a new Order favorable to appellant, deciding in this action that the Internal Revenue Service has no legal and constitutional claim under the *Internal Revenue Service Code of 1954* that reads on

the prosecution of the subject matter of "tips" in the deficiency assessment papers served on appellant.

Respectfully submitted,

/s/ SIDNEY O. SAMPSON
Appellant, pro se

Sidney O. Sampson
Post Office Box 3261
Grand Central Station
New York 10017, N. Y.

November 12, 1963

ROBOT EDUCATION SYSTEMS INC
P. O. BOX 326
GRAND CENTRAL STATION
NEW YORK 17, N. Y.

March 18, 1963

THE LEGAL RIGHTS TO DISSEMINATE, COMMUNICATE WITH OTHERS, TO ENLARGE THIS COPY, AND TO REPRODUCE AND CIRCULATE THIS PAPER IS HEREBY GIVEN FREE BY APPELLANT.

Regional Commissioner
U.S. TREASURY DEPARTMENT
Internal Revenue Service
90 Church Street
New York, N. Y.

Subject: PETITION TO INVALIDATE SECTION 61 OF THE INTERNAL REVENUE SERVICE CODE OF 1954

Sir:

I, Sidney O. Sampson, Appellant, requests that prior to the time of the Appellate hearing set for his tax case by the statutory notice of March 18, 1963, the annexed exhibits respectively numbered A through C be entered into the file-record of this case. The exhibits contain interrelated, corroborative subject matter to apply future argumenus in Law by Appellant against non sequitur "tips" subject matter shown to be the primary issue in this tax case undergoing prosecution by the IRS against Appellant for his alleged delinquent declaration of "tips", not being included in gross income tax specified in the IRS "Report of Examination".

Only penalty "Sec. 6653 (a)" has been cited in said Report to introduce the IRS claim that Appellant is liable for "tips-tax" prosecution. Appellant demands that the IRS point out, unequivocally, its precise prosecution basis-In-law; whereby at least one specific definitive statutory sub-section reference is clearly stated for complete understanding of the matter that Appellant has violated the Law. No antecedent section violation to cause said penalty section has been cited in said Report, under any "item" of Section 61.

Appellant will argue pointedly at the hearing against the illegal reservation clause in "General Definition (a)" included in said Section 61, to wit (but not limited to); that said illegal reservation clause is not only confined to said Section 61, but is so precisely placed therein that all of the underlying sub-sections of the Code are correspondingly invalid for any enforcement process by the IRS.

Exhibit A is a substantive, expert government agency reference, uniquely cited by Appellant for displaying conflicting claim positions of one government agency vs. another

er government agency thus to redound in favor of Appellant's defense. The Government cannot have this particular matter two ways. Appellant will therefore argue this matter to support his contention that Section 61 of the Internal Revenue Service Code of 1954 is invalid on its face and must be amended by Congress disclaiming said illegal reservation clause. This action must precede any new valid tax laws.

Therefore, Appellant submits that said Report be abandoned under stipulation to Appellant, thus for excluding similar matter from all other pending cases. The stipulation must include provisions for complete restitution by tax credits in all illegally prosecuted cases of the service workers, thus to gain their good will and the cooperation of involved Unions in the formulation of new "Sections" of the forthcoming new "tips-tax" and full social security withholding Law.

Appellant reserves the right to transfer this case at any time from Tax Court into District Court, prosecuting justice for all service workers being presently illegally persecuted by the IRS; there being no definition for "tip" shown anywhere in the Code.

Favorable action to this PETITION is requested.

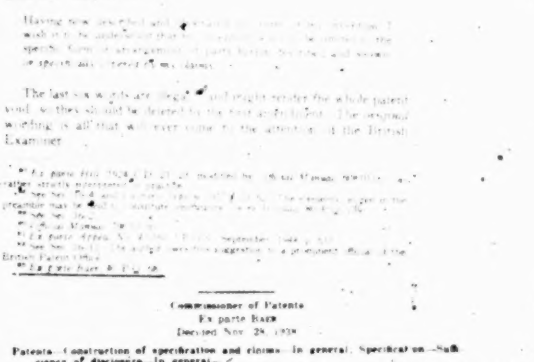
Respectfully submitted,

Sidney O. Sampson

Sidney O. Sampson, Appellant

NOTE: The following documentation of analogous subject matter, denotes that the IRS is illegally applying said illegal reservation clause "(but not limited to)" in its claim section, while the Patent Office is shown in the references below denying inclusion of similar illegal wording to similar subject matter in the construction of the claims of Applicant-Appellant's patent application:

A



Commissioner of Patents
Ex parte Barr
Decided Nov. 29, 1939

Patents. Construction of specification and claims. In general. Specification.—Sufficiency of disclosure. In general.

If statement in specification that appended claims should be construed as broadly as permissible in view of the prior art is only intended as statement that interpreting patent usual canons of construction should be followed it is unnecessary if it can be interpreted to mean that prior art rather than wording of claims is to be measure of protection granted it is improper it should be deleted.

On petition.

CHARLTON WHITE DAVIES HIBBERT AND HARRIS for Barr.

OPINION

Cox, Commissioner of Patents.—Applicant petitions from the requirement that the underscored (italic) portion of the following paragraph in the specification be canceled:

The foregoing detailed description has been given for clearness of understanding only and no unnecessary limitations should be understood therefrom, but the appended claims should be construed as broadly as permissible in view of the prior art.

The examiner objected to this language on the ground that it was an attempted interpretation of the claims, citing as authority for his action the Commissioner's decision in Ex parte Arbuckle 1930 C. D. 5.

In the Arbuckle case it was held improper for an applicant to state that he intended to claim the generic invention

should be canceled as surplusage. On the other hand, if the language can be interpreted to mean that the prior art rather than the wording of the claims is to be the measure of the protection granted the clause in question is clearly improper and should be deleted.

Section 4888 R. S. requires that an applicant shall—

"particularly point out and distinctly claim the part, improvement, or combination which he claims as his invention or discovery."

If claims are to be construed not by what they expressly state but only by what the prior art may show, then it would seem that the applicant has not complied with the statute.

Moreover the use of the language if effective for its intended purpose would tend to circumvent the law relating to reissues. The reissue statute (section 4916 R. S.) provides, subject to certain limitations that where a claim of a patent has been unduly limited a

C

The invention disclosed below is a division of my invention #5 entitled FOUR TRACK MAGNETIC TAPE RECORDERS, The effort of this invention's application has been abandoned. In its place, the following succeeding divisional application of the invention entitled TRACK SELECTION CONTROL MEANS FOR MAGNETIC SIGNAL RECORDING AND REPRODUCING SYSTEMS (Page 1), having the same eighty-two (82) claims previously prosecuted under petition and including the transference of the original drawings from said abandoned application is now under prosecution of the claims for immediate issuance to patent:

This invention is a continuation of my parent invention entitled AUTOMATIC DUAL REPRODUCING HEAD FOR TAPE RECORDING DEVICE, filed June 30, 1958, Serial No. 745,593, now patent 2,952,746; the patent having for its featured element part novel dual erase head means for erasing success-

ing of the matter that Appellant has violated the Law. No antecedent section violation to cause said penalty section has been cited in said Report, under any "item" of Section 61.

Appellant will argue pointedly at the hearing against the illegal reservation clause in "General Definition (a)" included in said Section 61, to wit (but not limitpd to); that said illegal reservation clause is not only confined to said Section 61, but is so precisely placed therein that all of the underlying sub-sections of the Code are correspondingly invalid for any enforcement process by the IRS.

Exhibit A is a substantive, expert government agency reference, uniquely cited by Appellant for displaying conflicting claim positions of one government agency vs. another, denotes that the IRS is illegally applying said illegal reservation clause "(but not limited to)" in its claim section, while the Patent Office is shown in the references below denying inclusion of similar illegal wording to similar subject matter in the construction of the claims of Applicant-Appellant's patent application:

A

Having now described and illustrated one form of my invention I wish it to be understood that my invention is not to be limited to the specific form or arrangement of parts herein described and shown, or recited specifically in my claims.

The last six words are illegal [**] and might render the whole patent void [***] so they should be deleted by the first amendment. The original wording is all that will ever come to the attention of the British Examiner

[*] *Ex parte Hall*, 1924 C.D. 21, 23 (quoted by [illegible] as [illegible] rather strictly interpreted in practice).

[**] See Sec. 154 and [illegible] (the comments recited in the preamble may be [illegible] constitute limitations).

[***] See Sec. 69 (1). The author [illegible] is a prominent official of the British Patent Office.

[****] *Ex parte Rose*, 8 Fig. 68.

Commissioner of Patents.
Ex parte Rabe
Decided Nov. 28, 1939

Patents—Construction of specification and claims—In general. Specification—Sufficiency of disclosure—In general.

If statement in specification that appended claims should be construed as broadly as permissible in view of the prior art is only intended as statement that in construing patent usual canons of construction should be followed, it is unnecessary; if it can be interpreted to mean that prior art rather than wording of claims is to be measure of protection granted, it is improper, it should be deleted.

On petition.

Chapman, Wiles, Davis, Hirschi, and Dawkins for Rabe.

Mr. Commissioner of Patents.—Applicant petitions from the requirement that the underscored (basic) portion of the following paragraph in the specification be cancelled:

"The foregoing detailed description has been given for clearness of understanding only, and no unnecessary limitations should be understood therefrom, but the appended claims should be construed as broadly as permissible in view of the prior art."

The examiner objected to this language on the ground that it was an attempted interpretation of the claims, citing as authority for his action the Commissioner's decision in *Ex parte Arburkle*, 1930 C.D. 5.

In the Arburkle case it was held improper for an applicant to state that he intended "to claim the invention broadly limited only by the scope of the appended claims." It appeared, however, that in that case the broad claims originally presented had been cancelled and much more specific claims presented. No such situation appeared here.

If the matter required to be cancelled is only intended as a statement that in construing the patent the usual canons of construction should be followed, the language is wholly unnecessary and should be cancelled as surplusage. On the other hand, if the language can be interpreted to mean that the prior art rather than the wording of the claims is to be the measure of the protection granted the clause in question is clearly improper and should be deleted.

Section 4488 R. S. requires that an applicant shall—

"particularly point out and distinctly claim the part, improvement, or combination which he claims as his invention or discovery."

If claims are to be construed not by what they expressly state but only by what the prior art may show, then it would seem that the applicant has not complied with the statute.

Moreover the use of the language, if effective for its intended purpose, would tend to circumvent the law relating to reissues. The reissue statute (section 4916 R. S.) provides, subject to certain limitations that where a claim of a patent has been unduly limited, a reissue with a broadened claim may be granted. If however the language to which the examiner objects is to be given the construction above indicated, it would seem that a patentee can obtain the same result at any time during the life of a patent by resorting to a redirection of the claims or instead of invoking the reissue laws.

Not infrequently an applicant for patent deliberately limits the claims in view

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[illegible] USPQ [illegible]

of his knowledge of research activities and experiments of others but as to which there has been no publication and which may never be published. It is therefore the express limitations that are made by the applicant to his claims are to be ignored in the absence of publication prior art, the result of this would be susceptible of a broader interpretation than the inventor himself regarded as within the scope of his own contribution. (For a situation similar to the above, see Conner v. Dean, 1909 C.D. 370; 138 App. D.C. 370.)

It would further appear that if claims are to be construed only by the prior art and irrespective of their express terms and limitations, the later of formulating claims and the burden of examination on the basis of prior art is all for naught and wasted effort. It would be far simpler and more logical to dispense with claim writing entirely and to allow the inventor to state that the disclosed invention is to be protected as broadly as permitted by the prior art uncovered by a defendant in litigation.

The present situation is to be distinguished from that discussed in *Ex parte Jamison*, 1904 C.D. 62, where the applicant was permitted to retain the following clause:

"I wish it to be understood that I do not desire to be limited to the exact details of construction shown and described, for obvious modifications will occur to a person skilled in the art."

The petition is denied.

Appellant will argue that whenever a service worker receives a "tip" from any person, over the wage paid by the employer, that said "tip" in lieu of its definition being omitted from the Code will be synonymous to gift defined therein. The following published extracts from an authoritative publication in the tax art are favorably cited to support Appellant's contention that the "gifts" and/or "tips" he receives are non-taxable and therefore the IRS has no legitimate case.

B

Gifts

A gift has been defined as "a valid transfer of his property from one to another without consideration or compensation therefor." For income tax purposes, the words "gift" and "contribution" usually have separate meanings, the latter word being used in connection with contributions to charitable, religious, etc., organizations whereas the word "gift" refers to transfers of money or property to private individuals, needy persons, friends, relatives, etc. The recipient of a gift is not required to include it in his gross income. Neither is the maker of a gift entitled to deduct it (except for business gifts to customers of $25 or less per donee per year). Property acquired by gift usually takes as its basis the same basis it had in the hands of the donor. For *gift tax* purposes, after the maker exhausts a $30,000 cumulative exemption, he is subject to a federal gift tax on annual gifts to any person to the extent that the total value of gifts to that person in the taxable calendar year exceeds $3,000. ¶ 625-952, 2294, 2298.08, 4536-4533.

Gross income

Gross income for income tax purposes refers to all income which is taxed. The law enumerates certain specific items of income which are not to be included in gross income, and therefore are nontaxable. With these exceptions, all income is includible in gross income. The more important of the exclusions are: Certain death benefits, gifts and inheritances, interest on state obligations, certain compensation for injuries or sickness and social security benefits. ¶ 601-661

C

The invention disclosed below is a division of my invention #5 entitled FOUR TRACK MAGNETIC TAPE RECORDERS. The effort of this invention's application has been abandoned. In its place, the following succeeding divisional application of the invention entitled TRACK SELECTION CONTROL MEANS FOR MAGNETIC SIGNAL RECORDING AND REPRODUCING SYSTEMS (Page 1), having the same eighty-two (82) claims previously prosecuted under petition and including the transference of the original drawings from said abandoned application is now under prosecution of the claims for immediate issuance to patent:

This invention is a continuation of my parent invention entitled AUTOMATIC DUAL REPRODUCING HEAD FOR TAPE RECORDING DEVICE, filed June 30, 1958, Serial No. 745,593, now patent 2,952,746; the patent having for its featured element part novel dual erase head means for erasing successive tracks recorded on the tape.

This application is a division of my track selection control means invention, first disclosed in the application entitled FOUR TRACK MAGNETIC TAPE RECORDERS, Serial No. 797,412 filed March 5, 1959. The other four (4) application divisions of the invention including their respective featured element parts are:

1. BULK TAPE RECORDING SYSTEM, Serial No. 830,356 filed July 29, 1959; this divisional application features the "relay means" part.
2. MEANS FOR AUTOMATICALLY PERFORATING AND/OR FOR CUTTING MAGNETIC TAPES, Serial No. 173 013, filed February 13, 1962; this divisional application features the "signal recording and reproducing" part.
3. COMPLETE TECHNOLOGICAL MODERNIZATION OF EDUCATION, Serial No. 152 359, filed November 14, 1961; this divisional application features the "stereo amplifiers" part.
4. CENTRAL CONTROL CONSOLE MEANS FOR TAPE RECORDERS, Serial No. 173 020, filed February 13, 1962; this divisional application features the "parallel tracks" part.

This application features the "control means" part as defined in the below made objectives of the invention.

This invention relates to the art of magnetic tape recording devices and particularly concerns an improved mag-

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Denial of Motion to Dispense With Filing an Appendix, Etc.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Motion denied.

HAROLD R. MEDINA,
STERRY R. WATERMAN,
THURGOOD MARSHALL,
U.S.C.J.J.

November 21, 1963

Filed November 21, 1963
A. DANIEL FUSARO, *Clerk.*

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Order Denying Motion to Dispense With Filing an Appendix, Etc.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-first day of November, one thousand nine hundred and sixty-three.

Present:

HON. HAROLD R. MEDINA,
HON. STERRY R. WATERMAN,
HON. THURGOOD MARSHALL,

Circuit Judges.

SIDNEY O. SAMPSON,

Plaintiff-Appellant,

—v.—

CHARLES A. CHURCH, District Director, Internal Revenue Service, HON. DAVID L. LADD, Commr. of Patents and HON. WILBUR D. MILLS, Chairman Ways & Means Committee,

Defendants-Appellees.

Order Denying Motion to Dispense With Filing an Appendix, Etc.

SIDNEY O. SAMPSON,

Plaintiff-Appellant,

—v.—

CHARLES A. CHURCH, District Director Internal Revenue Service,

Defendant-Appellee.

A motion having been made herein by appellant pro se for leave to dispense with filing an appendix and to dispense with printing a brief and for other and further relief,

Upon consideration thereof, it is

Ordered that said motion be and it hereby is denied.

A. DANIEL FUSARO,
Clerk.

—15—

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

Filed November 21, 1963

A. DANIEL FUSARO, *Clerk*

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Notice of Motion to Dismiss Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

63 Civ. 911

63 Civ. 1145

SIDNEY O. SAMPSON,

Plaintiff,

—v.—

CHARLES A. CHURCH, District Director, Internal Revenue Service,

Defendant.

SIR:

PLEASE TAKE NOTICE, that upon the annexed affidavit of Thomas H. Baer, sworn to the 13 day of November, 1963, the undersigned will move this Court at Room 1705, United States Court House, Foley Square, New York, N. Y., on the 18th day of November, 1963 at 10:30 A.M., or as soon thereafter as counsel can be heard, for an order dismissing these appeals as frivolous, and for such further and other relief as to the Court may appear just, pursuant to Rule 19, Rules of the United States Court of Appeals for the Second Circuit.

Notice of Motion to Dismiss Appeals

Dated: New York, N. Y., November 12, 1963.

Yours, etc.

ROBERT M. MORGENTHAU
United States Attorney for the Southern District of New York, Attorney for Defendant.

By: /s/ THOMAS H. BAER
Thomas H. Baer
Assistant U. S. Attorney
Office & Post Office Address:
U. S. Court House
Foley Square
New York, N. Y. 10007
Tel.: CO. 7-7100, Ext. 324

To:

SIDNEY O. SAMPSON
P. O. Box 3261
Grand Central Station
New York 17, N. Y.

Affidavit of Thomas H. Baer in Support of Motion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

63 Civ. 911

63 Civ. 1145

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF NEW YORK,
SOUTHERN DISTRICT OF NEW YORK, ss.:

THOMAS H. BAER, being duly sworn, deposes and says:

I am an Assistant U. S. Attorney in the office of Robert M. Morgenthau, United States Attorney for the Southern District of New York, and as such I am familiar with the facts and circumstances of the captioned cases.

I make this affidavit in support of defendant's application for an order dismissing plaintiff's appeals as frivolous.

Plaintiff's complaints in the United States District Court for the Southern District of New York sought orders declaring Section 61 of the Internal Revenue Code of 1954 unconstitutional. Plaintiff's controversy with defendant arises as a result of deficiency assessments levied against plaintiff.

The District Court, recognizing that it lacked jurisdiction in the absence of payment of the disputed assessment, dismissed the complaints. 26 U. S. C. §§7421, 7422. A copy of the District Court's memorandum is attached hereto and made a part hereof as Exhibit A.

Affidavit of Thomas H. Baer in Support of Motion

—18—

The plaintiff has never paid the tax deficiencies assessed against him. Thus, there is no colorable jurisdiction over the subject matter of these law suits, and the Court properly dismissed them and entered judgment for defendant.

Plaintiff does not appeal from the judgment in favor of the defendant. He takes exception with a paragraph in the Court's opinion. Plaintiff's notice of appeal dated October 10, 1963 seeks reversal of a paragraph in Judge Bryan's opinion, which is not a part of the order. This Court should not be a vehicle for alteration of portions of a District Court's opinion that are no part of the order entered.

WHEREFORE, defendant respectively prays for an order dismissing the appeals herein as frivolous, and for such other and further relief as to the Court may appear just.

/s/ THOMAS H. BAER
Thomas H. Baer
Assistant U. S. Attorney

(Sworn to November 13, 1963.)

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EXHIBIT A ANNEXED TO AFFIDAVIT OF THOMAS H. BAER

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

63 Civ. 911 and
63 Civ. 1145

SIDNEY O. SIMPSON,

Plaintiff.

—against—

CHARLES A. CHURCH, District Director
Internal Revenue Service,

Defendant.

MEMORANDUM

BRYAN, *District Judge*:

Plaintiff, appearing pro se, commenced an action in this Court on April 4, 1963 against the defendant Church as District Director of Internal Revenue. By an amendment to that complaint he sought to add as parties Defendant Hon. David L. Ladd, Commissioner of Patents, and Hon. Wilbur D. Mills, Chairman, Ways and Means Committee, United States House of Representatives. Plaintiff has now withdrawn his complaint as against these additional defendants.

On April 22, 1963 plaintiff instituted a second action against defendant Church as Director. The new complaint alleged that it was "a continuation in part of my prior

Complaint filed April 1, 1963 * * * now expressly abandoned."

—20—

Prior to the filing of the second complaint defendant Church made a motion to dismiss the first complaint pursuant to Rule 12(b) (1), (3) and (6), F. R. C. P. No motion has been addressed to the complaint in the second action instituted on April 22, 1963.

Upon the oral argument of the motion addressed to the first complaint, however, plaintiff requested the court to consider the record in both actions together as they constituted a single claim against the defendant and the second complaint served merely to clarity the first. Accordingly, defendant's motion will be deemed addressed to both complaints. Since matter outside the pleadings was presented at oral argument and not excluded, defendant's motion will be treated as one for summary judgment under Rule 56, F. R. C. P. (See Rule 12(b), F. R. C. P.)

As the caption on the second complaint indicates, this is a "Petition to the Federal District Court for Invalidation of Section 6f of the Internal Revenue Service Code of 1954" which defines gross income. Plaintiff is a waiter who opposes a deficiency assessment against him based on failure to report income from tips for the years 1959 and 1960.

Plaintiff's complaint fails to show that this court has any jurisdiction. He does not allege that he has paid the assessment, in which case jurisdiction might exist. 26 U. S. C.

—21—

7422. If he has not paid the assessment, this court is without jurisdiction to restrain its collection even in the light of the claim of unconstitutionality. 26 U. S. C. 7421. Indeed, it appears from the papers submitted by plaintiff

subsequent to argument that an action is now pending before the Tax Court on this very claim. Finally, plaintiff has shown no equitable grounds for exempting this case from the provisions of Section 7421. See Enoch v. Williams Packing Co., 370 U. S. 1 (1962).

Furthermore, in essence plaintiff's claim is that §61 of the Internal Revenue Code is unconstitutional as construed by the Service because his tips are gifts, not compensation for services. He also attacks §61 on its face because it does not contain a complete and exhaustive list of what constitutes income but defines income as "including (but not limited to)" the specified items. Finally, plaintiff alleges that the government is now barred from assessing a tax under a statute using such general language since the Commissioner of Patents, an agent of the government, has rejected an application which he made for a patent because it described his invention in similarly general terms. These claims are clearly without merit.

In light of all this, defendant's motion for summary judgment is granted and the complaints in both actions will be

dismissed. Judgment will be entered accordingly.

It is so ordered.

Dated: New York, N. Y.
October 9, 1963

/s/ Frederick P. Bryan
U.S.D.J.

Allowance of Motion to Dismiss Appeal

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Motion to dismiss appeal granted.

HAROLD R. MEDINA,
STERRY R. WATERMAN,
THURGOOD MARSHALL,
U.S.C.J.J.

November 21, 1963

Filed November 21, 1963
A. DANIEL FUSARO, *Clerk*

Judgment

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty first day of November, one thousand nine hundred and sixty three.

Present:

HON. HAROLD R. MEDINA,
HON. STERRY R. WATERMAN,
HON. THURGOOD MARSHALL,

Circuit Judges.

SIDNEY O. SAMPSON,

Plaintiff-Appellant,

—v.—

CHARLES A. CHURCH, District Director, Internal Revenue Service, HON. DAVID L. LADD, Comr. of Patents and HON. WILBUR D. MILLS, Chairman Ways & Means Committee,

Defendants-Appellees.

Judgment

SIDNEY O. SAMPSON,

Plaintiff-Appellant,

—v.—

CHARLES A. CHURCH, District Director
Internal Revenue Service,

Defendant-Appellee.

A motion having been made herein by counsel for the appellee to dismiss the appeal for frivolousness,

Upon consideration thereof, it is

Ordered that said motion be and it hereby is granted and that the appeal from the judgment of the United States District Court of the Southern District of New York be and it hereby is dismissed.

A. DANIEL FUSARO,
Clerk.

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UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

Filed November 21, 1963

A. DANIEL FUSARO, *Clerk*

Motion to Stay Issuance of Mandate

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

District Court Case Numbers 63 Civ. 911 and 63 Civ. 1145 now Consolidated as Case Number 28561 in this Court.

[SAME TITLE]

SIR:

1. PLEASE TAKE NOTICE that, Appellant will move this Court, at the Motion Part thereof, to be held at Room 1705, United States Court House, Foley Square, City and State of New York, on the 2nd day of December, 1963, at 10:30 a.m., or as soon thereafter as appellant can be heard, for an Order pursuant to Rule 28 of the Rules of the Court of Appeals for the Second Circuit, for the following relief:

2. Appellant respectfully requests an Order to stay the mandate of this Court dated November 21, 1963 which has not yet been made final; pending application for Certiorari to the Supreme Court of the United States.

3. Appellant also requests that the inadvertently made errors in said captioned matter be corrected to conform with the Rules of the Court of Appeals for the Second Circuit, as follows:

(a) In the "NOTE OF ISSUE" filed November 7, 1963, first paragraph thereof, change "Rule 20" to: "*Rule 19*";

Motion to Stay Issuance of Mandate

(b) In paragraph "3" at same delete: "Rule 24 (3) subdivisions (b), (c), (d), and (e)." insert in place: "*Rule 17, subdivision (b)*."

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(c) In the brief filed November 7, 1963, paragraph "I" change: "Rule 30" to: *Rule 17, subdivisions 1, 2*.

Respectfully submitted,

SIDNEY O. SAMPSON
Plaintiff-Appellant, pro se

Dated: New York, New York
November 26, 1963

SIDNEY O. SAMPSON
Post Office Box 3261
Grand Central Station
New York 17, N. Y.

ROBERT M. MORGENTHAU
United States Attorney for the
Southern District of New York
Attorney for Defendant

THOMAS H. BOOK
Assistant United States Attorney
Of Counsel

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Allowance of Motion to Stay Issuance of Mandate

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

[SAME TITLE]

The motion for a stay is granted provided that within thirty days the plaintiff-appellant *pro se* files an application for certiorari to the Supreme Court in accordance with the provisions of Rule 28(c) of the Rules of this Court.

The motion regarding the corrections to be made in the note of issue and brief filed November 7, 1963 is granted.

HAROLD R. MEDINA,
STERRY R. WATERMAN,
U.S.C.J.J.

December 12, 1963.

Order Granting Motion to Stay Issuance of Mandate

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twelfth day of December, one thousand nine hundred and sixty-three.

Present:

HON. HAROLD R. MEDINA,
HON. STERRY R. WATERMAN,
Circuit Judges.

SIDNEY O. SAMPSON,

Plaintiff-Appellant,

—v.—

CHARLES A. CHURCH, District Director, Internal Revenue Service, HON. DAVID L. LADD, Commr. of Patents and HON. WILBUR D. MILLS, Chairman Ways & Means Committee,

Defendants-Appellees.

SIDNEY O. SAMPSON,

Plaintiff-Appellant,

—v.—

CHARLES A. CHURCH, District Director Internal Revenue Service,

Defendant-Appellee.

Order Granting Motion to Stay Issuance of Mandate

A motion having been made herein by appellant pro se to stay the issuance of the mandate pending application for a writ of certiorari to the Supreme Court of the United States, and for other and further relief,

Upon consideration thereof, it is

Ordered that said motion be and it hereby is granted in accordance with Rule 28(C) of the rules of this court.

Further ordered that certain errors made in the note of issue and brief filed November 7, 1963, by the appellant pro se, shall be corrected.

A. DANIEL FUSARO,
Clerk.

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UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

Filed December 12, 1963

A. DANIEL FUSARO, *Clerk*

Clerk's Certificate

UNITED STATES OF AMERICA

SOUTHERN DISTRICT OF NEW YORK

I, A. DANIEL FUSARO, Clerk of the United States Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 31, inclusive, contain a true transcript of the proceedings had in said Court, in the case of

SIDNEY O. SAMPSON,

Plaintiff-Appellant,

—v.—

CHARLES A. CHURCH, District Director, Internal Revenue Service, Hon. DAVID L. LADD, Commr. of Patents and Hon. WILBUR D. MILLS, Chairman Ways & Means Committee,

Defendants-Appellees.

SIDNEY O. SAMPSON,

Plaintiff-Appellant,

—v.—

CHARLES A. CHURCH, District Director Internal Revenue Service,

Defendant-Appellee.

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as the same remain of record and on file in my office.

Clerk's Certificate

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this seventeenth day of December in the year of our Lord one thousand nine hundred and sixty-three, and of the Independence of the said United States the one hundred and eighty-eighth.

(Seal)

/s/ A. DANIEL FUSARO,
Clerk.

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FILED
JAN 24 1964
JOHN F. DAVIS, CLERK

No. 712

In the Supreme Court of the United States

OCTOBER TERM, 1963

SIDNEY O. SAMPSON, PETITIONER

v.

CHARLES A. CHURCH, District Director of Internal Revenue, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

ARCHIBALD COX,
Solicitor General,

LOUIS F. OBERDORFER,
Assistant Attorney General,

JOSEPH KOVNER,
CEOMBIE J. D. GARRETT,
Attorneys,
Department of Justice,
Washington, D. C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 712

SIDNEY O. SAMPSON, PETITIONER

v.

CHARLES A. CHURCH, District Director of Internal Revenue, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

In his income tax returns for 1959 and 1960, petitioner, a waiter, reported as income certain amounts received by him as tips. The Commissioner found that petitioner had received in tips amounts greater than those reported and determined deficiencies accordingly, mailing the statutory notices to petitioner on March 14, 1963. Without having paid the de-

ficiencies or filed claims for refund for taxes previously paid, petitioner, on April 1, 1963,[1] brought this action against the District Director seeking a declaration that tips, not being specifically enumerated in the definition of gross income (§ 61, Internal Revenue Code of 1954), are not includible in income and that the statute, if interpreted as authorizing the inclusion of tips despite the failure to enumerate them, is unconstitutional as a delegation of legislative power. The district court dismissed the action for lack of jurisdiction (Pet. 23a-25a), and the court of appeals dismissed petitioner's appeal as frivolous (Pet. 26a-28a). Shortly after bringing this action, on April 16, 1963, petitioner also filed a petition for redetermination of the deficiencies in the Tax Court (see Pet. 4). The Tax Court proceedings (Docket No. 1958-63) are still pending.

The decision below is correct. As a suit for refund, petitioner's action is barred by his failure to file claims for refund (§ 7422, 1954 Code), by his failure to pay the deficiencies (*Flora* v. *United States*, 362 U.S. 145), and by his subsequent filing of a petition in the Tax Court (§§ 6512(a) and 7422(e), 1954 Code). As a suit for an injunction or a declaratory judgment, it is expressly barred by statute. (§ 7421(a), 1954 Code; 28 U.S.C. 2201). Petitioner's arguments on the merits, both as to the reach of § 61 in general[2]

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[1] A second complaint was filed on April 22, 1963.

[2] See *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426.

and as to the taxability of tips in particular, are equally without substance. The petition for certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

LOUIS F. OBERDORFER,
Assistant Attorney General.

JOSEPH KOVNER,
CROMBIE J. D. GARRETT,
Attorneys.

JANUARY 1964.

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[1] See *Andrews* v. *United States*, 295 F.2d 819 (Ct. Cl.), certiorari denied, 369 U.S. 829; *Roberts* v. *Commissioner*, 176 F.2d 221 (C.A. 9); *Commissioner* v. *Duberstein*, 363 U.S. 278, 285 n. 7; Treas. Regs. (1954 Code), § 1.61-2.

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